As noted earlier, at least one of the Notice's alternatives contemplates price caps as the regulatory formula for the basic service tier. Only in its purest abstract form can a price cap formula benefit consumers. And it is well near impossible, as either a legal or political matter, for price caps to be assuredly implemented in that pure form.

The principal problem here is the need for subsequent adjustments. Over time (and in a dynamically changing environment such as the cable industry that time will be fairly short) the price cap formula will very likely become either too substantial a constraint on earnings, or not enough of one. In the former case, the issue can rise to one of constitutional significance under the Fifth and Fourteenth Amendments. Even short of that, the price cap needs adjustment to ensure that sufficient earnings will exist to produce additional growth, investment, etc. In the latter case, where the price cap has lost its constraining effect, it has failed to satisfy the statutory requirements as well as the political imperatives behind them. See generally, I. Vogelsang, "Price Cap Regulation of Telecommunications Services: A Long Run Approach" (Rand 1988).

To accommodate of this need for adjustment, the FCC has implemented price cap regimes for the telephone industry that contain both a pre-announced periodic review and sharing mechanisms based upon earned rates of return. It has been observed by experts in the field that these sorts of triggers provide the price cap-regulated firm with "the incentive to respond to such a scheme of 'price level' regulation as though it were actually subjected to rate of return regulation." Braeutigam & Panzar, "Diversification Incentives Under 'Price-Based' and 'Cost-Based' Regulation," at 27-28 (1988) (emphasis added).

Perhaps the leading expert in utility regulation, Professor Alfred E. Kahn, in the context of making recommendations regarding the appropriate regulatory environment for the New York cable industry, has urged that cost-based regulation not be visited upon cable:

> [W]e would strenuously resist any attempts to convert [cable regulation] to the traditional public utility mold, basing allowable rates on an acceptable return on invested capital, with all its inescapable paraphernalia of uniform systems of accounts, valuation of rate base, allocations of investment and operating costs between "basic" and other services and estimation of cost of capital.

See "Telecommunications in New York State: Redefining the Role of Government," New York State Executive Chamber, Office of Development Planning (1981), Appendix B (Memorandum of March 25, 1981 from Alfred E. Kahn and Irwin M. Stelzer to Governor Hugh L. Carey). Cost-based regulation, whether in the form of traditional rate of return regulation or telephone-type price caps would cause enormous direct costs, in the form of administrative burdens on local franchising authorities, the FCC, and cable operators. More significant, however, are the indirect costs of inefficiency and reduced innovation.

B. Components of the Basic Tier

The Notice seeks comment on varying aspects of the make-up of the basic service tier. Notice, at ¶¶ 11-13. The new Act requires that three categories of programming be placed on the basic service tier: the "must-carry" stations, public, educational and government access channels, and any other broadcast signal other than superstations.[10] Operators are free to add to the basic service tier, but any additions are subject to regulation. Act, § 623(b)(7). TCI agrees with the Notice's tentative conclusion that ACLU[11] and its definition of "basic" is superseded by the new legislation. Regardless of whether cable operators offer upper tier prices on an incremental or a cumulative basis, there is only a single basic service tier that can be regulated by the local authorities. All other programming is to be unregulated by local governments. The Commission should make this clear in its implementation order.

In establishing the regulatory framework for basic service, the Commission must be cautious not to interfere with

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10 We expect that in the future there may be part-time carriage arrangements or even joint venture programming in which programming delivered by "broadcast" sources might properly be placed on tier. The Commission should invite waiver petitions to accommodate such cooperative solutions.

11 American Civil Liberties Union v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), cert. denied, Connecticut v. FCC, 485 U.S. 959 (1988).

a cable operator's legal ability to offer greater unbundling -- up to and including complete a la carte offerings. The Notice questions whether the new Cable Act, in defining basic service as a tier "to which subscription is required for access to any other tier of service," establishes a "basic buy-through" requirement which could be interpreted to preclude complete a la carte offerings.[12]

As a matter of sound policy -- policy which is actually endorsed by the legislative history of the enactment -- the Commission must construe this language as narrowly as the law permits.

The Commission should refrain from impeding cable operators' initiatives to unbundle completely. Forcing unwilling consumers to purchase the basic tier as a condition to receiving programming on a per channel or pay per view basis contradicts the statute and congressional intent. It is also inconsistent with both the Commission's and Congress' stated goals for Section 623(b)(8) -- the buy-through prohibition. In the buy-through Notice, the Commission stated that "the goal of the Act's buy-through prohibition is to foster the ability of subscribers to choose freely among available programming services."[13] In addition, the Notice cited the Senate Report

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12 Notice at ¶ 12.

13 Tier Buy-Through Prohibitions, Notice of Proposed Rule Making in MM Docket No. 92-262, FCC 92-540 (released Dec. 11, 1992) at ¶ 3.

that states "[t]hrough unbundling, subscribers have greater assurance that they are choosing only those program services they wish to see and are not paying for programs they do not desire."[14] Given these express goals, it would indeed be a strange reading that would render a governmentally imposed requirement that all subscribers buy basic.

At most, this provision should be read to require the purchase of the basic tier in order to receive a tier of cable programming services, but no more.[15] It should not be construed to require the purchase of the basic tier for complete a la carte offerings. The literal language of Section 623(b)(7)(A) will not permit a reading which would interfere with either a full a la carte offering or, in fact, any offering involving programming on a per channel or per program basis. Thus, a cable operator would be free to sell a full a

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14 Id. See also S. Rep. No. 92, 102d Cong., 2d Sess., at 77 (1992)("Senate Report").

15 In addition, it is not a foregone conclusion that even tiered programming must be bundled with the basic tier. First, such a construction would put the "must carry" requirements in even greater jeopardy; with a bundling requirement they become "must carry/must buy" rules which directly interfere with consumer choice as well as operator choice. Second, a better interpretation, and one more harmonious with the goal of unbundling, is to understand the language "to which subscription is required for access to any other tier" as merely descriptive of the traditional arrangements which Congress did not intend to disturb. Thus the language is intended to be permissive but not mandatory. Cable operators, at their discretion, could require basic tier subscription as an "access tier" but would not be required to do so.

la carte offering, or even a single channel on a stand-alone basis. This makes complete policy sense, for so long as the programming is offered on a stand-alone basis, the opportunity for consumer choice is maximized.

A la carte services, pay channel services and pay-per-view programs are not tiers within the meaning of the Act. This should hold true even if multiple channel discounts or packages are available. The Act should be read so as to limit the term tier to a bundle of services that contains channels that are not also available individually. Accordingly, even the purchase of two pay programming channels as a package or some other form of discount does not constitute a tier, provided that the cable systems also offers them for sale individually.

TCI appreciates that this construction means that a cable operator can determine how a particular channel is regulated by how it offers its availability. We respectfully submit that this is consistent with the Act and public policy. First, the Act expressly encourages unbundling, and precludes regulation of any programming "offered on a per channel or per program basis." Act, § 623(1)(2). Second, the Act permits a basic tier to contain only the statutory minimum number of channels, at the election of the cable operator. Act, § 623(b)(7)(B). Additions to the basic service tier are permitted. Id. These provisions reflect a statutory scheme in which operators are given ample flexibility to structure their programming in a variety of ways. Plainly, both negative and positive inducements have been provided by Congress by adjusting the regulatory consequences for certain configurations. The choices are left to the cable operator, however.

Cable companies should be similarly free to offer digital cable radio, interactive service, transactional services and non-video services without requiring customers to purchase the basic tier. None of these services relates to the underlying purposes of establishing a basic service tier, and many do not even connect to the customer's TV receiver.

C. Rate Regulation of Cable Programming Services

The Act instructs the Commission to establish criteria to determine in individual cases whether the rates for cable programming services in systems not subject to effective competition are unreasonable. Act, § 623(c)(1). In doing so, the Act intends to subject to inquiry only the egregious cable programming service rates of "bad actors," not the cable programming rates of all cable systems. The Commission must establish a mechanism through which it may identify those cable operators who are charging egregious rates, and leave the remainder of the cable industry within a safe harbor.

A safe harbor/bad actor approach is critical if the cable industry is to continue to expand its offerings to consumers. Since deregulation, the industry has experienced widespread capital improvements, in addition to increased channel capacity and programming innovations. Congress expressly acknowledged these consumer gains. See House Report at 31. Further, no one disputes that the FCC rules of the 1970's served to severely impede cable television. As Besen et al. indicate, the FCC's 1976 policy reversal regarding cable regulation affected the performance of the cable industry:

> [b]etween 1976 and 1984, basic subscribership and the number of systems offering more than 12 channels to subscribers nearly tripled while the number of nationally distributed satellite services rose from 4 to 49.

Besen et al., at 9. There is a demonstrable nexus between the quality and quantity of programming, and the cable regulatory environment. As Besen et al. indicate, the "historical sensitivity of cable programming services to regulatory restrictions, combined with what may be substantial new restraints on the basic cable rates, suggests that rigidly regulating cable programming service rates may limit further gains to consumers or even reverse past gains." Besen et al., at 40.

Thus, the Commission should seek to establish a threshold to assess only those systems with unusually high prices. The threshold would also give shelter to cable rates beneath those price levels. Separate thresholds for systems in different categories would be appropriate, as explained by Besen et al. Id. at 45-46. Thus, they suggest that the rate at the 95th percentile of all subscribers within any given cable system category would be an appropriate test for considering "bad actor" rates. Id. at 45. This approach would also serve the statutory purpose to "rein in the renegades"[16] while leaving the remainder of the industry free to grow to meet consumer demand. While the Notice discusses a similar approach to be used as a benchmark, TCI submits that the adjustments suggested below are less intrusive and thus more consistent with the overall regulatory scheme.

The threshold would necessarily have to be adjusted in subsequent years. If the FCC were to simply recalculate the 95th percentile each year, however, there would be a "racheting down" effect, that is, the threshold would be artificially lowered due to the unintended effects of regulation. Besen et al., at 48. As Besen et al. point out, in the extreme, all cable systems would eventually be covered by the bad actor provision so that some other adjustment mechanism is thus required. Id. Besen et al. thus suggest that the threshold be raised by the average annual percentage increases of the "good actor" systems.[17] This mechanism would account for changes in programming and equipment costs, technical improvements in the cable distribution plant, and changes in the general price level. Id. Even with this approach, they note, there can be

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16 Statement of Senator Inouye, 138 Cong. Rec. S561 (1992)

17 Id. at 49.

unintended harm. If programming or other costs would have increased more rapidly but for the bad-actor threshold, some programming services or capital improvements may be consequently foregone to keep the increase low enough to remain below the threshold. Id. One possible solution is an "open season" refinement every several years to ensure that industry-wide improvements can be made without undue regulatory disruption. Id. at 49-50.

D. Regulation of Equipment Rates

The regulatory classification of equipment under the 1992 Cable Act is at best ambiguous. It is far from clear what Congress intended, for various sections appear to conflict with one another. In resolving these problems, the Commission should be guided by sound public policy decisions and the stated objectives of the Act.

TCI respectfully submits that the regulation of equipment under the new law should track the regulation of services. Thus, equipment provided to subscribers who only subscribe to the basic tier would be subject to direct cost-based regulation. Equipment provided to expanded basic tier subscribers would be regulable under the "bad actor" approach, since equipment is included within the definition of cable programming services. Equipment ordered by pay channel or pay per view subscribers, like the services they are used to deliver, would remain free of regulation.

1. Equipment Used To Receive Cable Programming Services

The Act imposes certain restraints on rates that can be charged for cable installation, additional outlets and for equipment used by cable subscribers, including converter boxes and remote control devices. Act, at §§ 623(b)(3), 623(c). The nature of the restraint depends on whether the subscriber who orders the equipment subscribes to cable programming services, the basic service tier and/or premium programming. Customers who subscribe to the basic cable tier and no more are singled out under the terms of the Act, and placed in a special category of subscribers. The equipment that these basic cable tier only subscribers order is subject to cost-based regulation.

Equipment that is ordered by subscribers who only subscribe to the basic service tier is subject to the ratemaking provisions of Section 623(b)(3) of the Act. That section requires the Commission to prescribe standards for establishing, based on actual cost, the rates cable operators can charge for the installation and/or use of equipment ordered by basic service tier only customers. This ensures that the low-cost basic service tier is not inflated by above-cost equipment charges, and thus remains a low-cost option for consumers.

Rates for equipment ordered by cable programming services subscribers, regardless of whether the equipment is also used to receive the basic service tier, are regulated pursuant to the bad actor scheme. Thus, rates for equipment that a cable programming service customer receives from a service provider who is classified as a bad actor would be subject to regulation. This interpretation is consistent with the literal terms of sections 623(C) and 623(l)(2). The Act defines cable programming services as:

> [a]ny programming provided over a cable system, regardless of service tier, <u>including installation or rental of equipment used for receipt of such video programming</u>, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis.

<u>Act</u>, § 623(l)(2) (emphasis added). The inclusion of the underlined language in the definition of cable programming services makes the subscription to cable programming services the operative factor in determining how cable equipment is to be regulated. As long as a piece of equipment is used by (or installed for) a customer who receives cable programming services, it is regulated under Section 623(c).

The statutory construction problem facing the Commission is plain: equipment may be used for both purposes. The Commission should construe the conflicting sections to give meaning to both.

A review of the legislative history of the Act supports the conclusion that equipment ordered by subscribers who receive cable programming services -- even if it is used also to receive basic -- is subject to regulation only under

§ 623(c), not 623(b). The Senate version of the cable legislation had defined cable programming service as:

> [a]ll video programming services, <u>including installation or rental of equipment not used for the receipt of basic cable service</u>, regardless of service tier, offered over a cable system except basic cable service and those services offered on a per channel or per program basis.[18]

The House counterpart, H.R. 4850, contained the following definition of cable programming service, which made no mention of equipment:

> The term 'cable programming service' means any video programming provided over a cable system, regardless of service tier, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis.[19]

The House-Senate conference adopted the House language, with one critical change -- the addition of the very language at issue here -- "to include installation or rental of equipment used for receipt of such video programming."[20] When the conferees amended the House definition of cable programming services to include equipment within its ambit they did not simply adopt the Senate language underlined above. Had Congress adopted the Senate language, with its reference to

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18 138 Cong. Rec. S762 (daily ed. January 31, 1992) (emphasis added).

19 138 Cong. Rec. H6563 (daily ed. July 23, 1992).

20 <u>Act</u>, § 623(l)(2); H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess., at 66 (1992) ("Conference Report").

"equipment not used for the receipt of basic cable service,"[21] the criteria used in determining whether a particular piece of equipment would be subject to cost-based regulation pursuant to Subsection 623(b) would be quite different. The determinative question then would be whether a converter box or remote is used solely to receive the basic service tier. Equipment so used would be outside the Senate's definition of "cable programming service," and, consequently, subject to cost-based regulation pursuant to Subsection 623(b).

However, the Act does not incorporate the S.12 test. Rather, the Act asks whether the equipment is "used for receipt" of cable service programming.[22] This language makes the determinative inquiry whether the equipment in question is used to receive cable programming services. If the equipment is so used, the inquiry ends, and the equipment is subject to regulation as a cable programming service under Section 623(c), rather than basic tier equipment under Section 623(b).

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21 138 Cong. Rec. S762 (daily ed. January 31, 1992). See also, Senate Report at 73.

22 Act, § 623(l)(2).

2. Equipment Used to Receive Video Programming Offered on a Per Channel or Per Program Basis

The remaining construction task lies in the language contained in the second phase of Section 623(b)(3)(A) which directs the inclusion of regulation "if requested by the subscriber, such addressable converter box or other equipment as is required to access programming described in paragraph (8)." Act, § 623(b)(3)(A). The reference is to Section 623(b)(8)(A) of the Act, which prohibits cable operators from requiring subscribers to subscribe to any tier other the basic service tier as a precondition to receiving premium programming.

The language of § 623(b)(3) should be understood to include a very specific subset of equipment and a particular pricing practice in order to prevent evasion of the buy-through prohibition. Absent such inclusion, a cable operator could have evaded the buy-through prohibition by charging such a basic subscriber more than other subscribers for the addressable converter box (or other equipment) used to receive premium programming.[23] Equipment used by premium subscribers who also elect to purchase cable programming services, and which does not raise buy-through concerns, remains exempt from

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23 Discrimination with respect to the prices of pay programming is directly foreclosed under 623(b)(8)(A) itself.

cost-based regulation by operation of Sections 623(l)(2) and (c).

3. The Framework for Equipment Regulation Must Foster Competition and the Development of New Equipment Technologies

The Act works to strike the appropriate balance between assuring affordable equipment rates and avoiding the costs to both cable operators and subscribers of over-regulating such rates. It strikes this balance by imposing cost-based regulation solely on equipment furnished to basic service tier-only subscribers and declining the invitation to foist such regulation on equipment used to receive cable service programming or pay programming.

This balance is appropriate as it promotes the dual goals of (1) affording the greatest number of people the opportunity to subscribe to the basic service tier[24] and (2) promoting the development of new equipment technologies and a competitive market for converters and remotes.[25] Furthermore, the Act protects subscribers to cable programming services against unreasonable equipment charges by empowering the Commission to reduce rates if the cable programming service

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24 Act, §§ 2(a)(17), 2(a)(19).

25 See Act, § 624A(c)(2)(C)-(D).

rates together with the rates for the related equipment are found to be unreasonable.[26]

If all equipment were subject to cost-based regulation, the incentive to invest risk capital in the research and development of new equipment technologies would be stifled. This concern is not a theoretical one, as the development of equipment to receive digitally compressed transmissions looms on the near-term horizon. TCI's ultimate objective is to provide its customers with more choice and more control. Digital compression, including the terminals, are a critical part of this objective. TCI has already contracted to purchase up to one million digital compression terminals for distribution to approximately 10 percent of its customers. It has initially spent or budgeted over $200 million to support this technology. Subjecting this equipment to cost-based rate regulation would be a severe impediment to its production and distribution, and would discourage any future risk-taking. It would also be in direct contravention of the Congressionally expressed policies of

> (1) promot[ing] the availability to the public of a diversity of views and information through cable television and other video distribution media;
>
> (2) rely[ing] on the marketplace, to the maximum extent feasible, to achieve that availability; [and]

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26 See Act § 623(c)(1) and 623(l)(2). See also, Act § 623(c)(2)(D).

(3) ensure[ing] that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems.[27]

Subsection 624A(2)(C) of the Act directs the Commission to promulgate regulations that promote the commercial availability of converter boxes and remotes from both cable operators and independent retail vendors. Act, § 624A(2)(c). Congress correctly recognized that the marketplace is the best arbiter of equipment rate levels. Equipment competition should have a direct effect on the Commission's "cost" regulation, as discussed below.

4. The Commission's Standards for Regulation of Equipment Should be Based on Costs

The statute requires that the regulation of this basic service tier equipment on the "basis of actual cost." Act, § 623(b)(3). Of course, "actual cost" necessarily includes the cost of capital, that is, a profit commensurate with the risk and use of capital. As discussed by Besen et al., if the Commission feels bound to determine actual costs, it should in conjunction with the industry perform a "special study." See Besen et al., at 37. This could be used to derive a range of reasonable prices for categories of equipment.

Alternatively, the Commission could seek out competitive price benchmarks, which can be presumed to be at

27 Act, § 2(b)(1)-(3).

"cost." Two proxies are readily available: first, the Commission could use the equipment prices charged by systems confronting effective competition. Second, the Commission could look to retail prices for those pieces of equipment that are available through retail outlets. Indeed, where types of equipment are readily available elsewhere, the Commission can safely assume that cable operators are constrained to charge the competitive market price. Since it is fundamental that competition drives prices to cost, it will have fulfilled its statutory obligation.

E. Charges for Changes in Services

1. The Commission Should Interpret Section 623(b)(5)(c) to Reflect the Act's Overall Regulatory Scheme

Subsection 623(b)(5)(C) instructs the Commission to promulgate standards to govern charges for changes in the selection of those services or equipment which are subject to regulation under Section 623. Act, § 623(b)(5)(C). Thus, the fundamental question is whether the service (or related equipment) to or from which the change is being made is itself subject to rate regulation.

The regulation of charges for changes to or from the tier of cable programming would thus reflect the overall statutory scheme. Changes to or from the basic service tier would be directly regulated, as discussed in the following section.

2. Charges Assessed For Changes Should Be Evaluated on the Basis of Costs

Charges assessed for either: (1) changes to or from the basic service tier; or (2) changes by customers receiving cable programming services whose operators are subject to regulation under the "bad actor" provisions, must be "based on the cost of such change." Act, § 623(b)(5)(C). Here, too, cost includes a reasonable profit. The statute recognizes that these changes may be accomplished via different means, depending upon the system's technology. A service change may require a truck roll-outs to install, remove or rearrange traps. Installation charges, regulable under Section 623(b)(3)(A), can be used to measure the reasonableness of charges here. Where service changes can be accomplished solely via computer entry at the head-end, the section specifies that a "nominal amount" should be charged.

High churn rates, however, are just as costly in their indirect effects as the direct costs involved in roll-outs, as the Notice correctly observes. The costs of instability and uncertainty created by high churn are borne by not only the cable company but also by its customers. The "nominal amounts" allowable under this section should be sufficiently flexible so as to account for, and where possible, avoid these costs. Change rates should be permissibly designed to discourage wholly arbitrary, continuous changes by subscribers.[28] For example, service change charges should be allowed to escalate if a particular subscriber orders multiple changes within a certain period of time. Similarly, the "nominal amount" itself, even for the first change, should reflect some of the indirect costs of churn.

One ready means of minimizing the administrative burdens of regulating under this section is to create a presumption of reasonableness where downgrade charges are at or below the price levels for upgrades. The regulation of change charges reflects Congress' concern that excessive change charges were being imposed as a means of discouraging cable subscribers from downgrading service. In contrast, the upgrade rate can be expected to be reasonably low because the cable operator has every incentive to promote subscription to all of its programming. Where the rate to downgrade does not exceed the rate to upgrade, the downgrade and upgrade rates are entitled to a presumption of lawfulness.

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28 The problem here is commonly understood in the economic literature as one of "moral hazard". If cable subscribers are free to impose costs for which they are not financially responsible, then they have no incentive to act to reduce or minimize those costs. They are, in effect, spending other people's money.

IV. THE RATE REGULATION PROCESS

It is critical that the procedures adopted by the Commission, either for its own rate regulation or that conducted by the franchising authorities, be as simple and streamlined as the regulation of the rates themselves. Even more importantly, they must not reinvite regression to public utility notions, for all the reasons set forth in Section IV(B)(1). Prior to discussing the actual procedures which TCI recommends for Commission adoption, it is helpful to examine and analyze the statutory scheme, as well as the constitutional limits upon, the division of authority among the FCC, the states and the local franchising authorities.

A. The Division of Regulatory Authority Among Federal, State and Local Governments

The Notice seeks comment on its proposed interpretation of the division of authority with respect to rate regulation. Notice, at ¶ 20. Specifically, the FCC proposes to read Section 623 to allow local or state authorities to regulate pursuant to federal regulation, or elect not to regulate and thus leave the particular system unregulated. Id. at 15. Under this statutory construction, the FCC would regulate basic service rates only after a local franchising authority had attempted to regulate but had its certification denied or revoked by the FCC. The language of the statute suggests that this would be temporary, insofar as the local authority would promptly seek to conform its regulatory approach with the federal regulations in order to obtain or reinstate its certification. See Act, § 623(a)(6).

The decision not to regulate by local or state officials need not be re-opened by the federal government. While Congress established a framework in which local regulation, if undertaken, would be subject to federal rules and enforcement,[29] it did not provide for the FCC to reverse local decisions not to regulate. The local government's decision to regulate in the first place will be based on whether the direct costs of administering regulation are worth undertaking. While many jurisdictions may elect not to seek certification, that is hardly an indictment of the statutory scheme. On the contrary, it makes little sense to insist that federal taxpayer dollars be spent to regulate in situations where local consumers did not want to spend local tax dollars.

Additionally, the Notice asks whether exercise by the Commission "of basic service rate regulation authority pursuant to Section 623(a)(6) in a state prohibiting rate regulation by local authorities would in fact constitute preemption of state law." Notice at ¶ 20. Section 623(a)(3) does not preempt state law which prohibits local authorities to rate regulate -- it does not authorize the FCC to regulate in such circumstances.

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29 Federal oversight in the former case is necessary because of the "prisoner's dilemma" problems inherent in local regulation of cable service. See Besen et al., at 44.

The Act contemplates preemption where the law of the State or the language of the franchise agreement is inconsistent with the Act.[30] Here, provisions in state laws or franchising agreements which prohibit rate regulation clearly are not inconsistent with the Act. The Act states that "the Commission shall exercise the franchising authority's regulatory jurisdiction. . . ." Act, § 623(a)(6). As noted below, however, the Act neither mandates that local authorities be granted power to regulate, nor independently empowers local authorities to rate regulate. Rather, such power may only be granted to the franchising authority by the state. Thus, if rate regulation by local authorities is prohibited by either state law or the franchise agreement, Section 623(a)(6) simply extends to the Commission that which the local franchising body has, namely, a rate regulation prohibition.[31] Accordingly, local law would prohibit rate regulation, and the Commission would also be prohibited from regulating rates. Since the Commission would not have the authority to exercise any rights

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30 Section 636(c) of the Act states, in pertinent part, that:

> any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded.

31 If franchise agreements entered into after 1984 preclude rate regulation solely as a reflection of the 1984 Act, they may possibly be subject to reformation. That decision is a matter of state contract law.

other than those conferred under state law and through the franchise agreement, state law and the franchise agreement will not be inconsistent with the rights that the Act grants to the Commission. Thus, preemption will not occur.

The Notice also properly questions the source of franchising authorities' power to regulate cable rates. Notice, at ¶ 20. The Notice asks whether the powers of local governments to regulate rates can be derived solely from state or local laws, or whether the Act itself may grant such regulatory authority. The Commission has no choice but to conclude that the Act does not grant authority to local governments beyond that which they have been delegated under state law.

It is a general principle that local governments are creatures of state law. As products of the state, municipalities do not possess inherently the power to grant franchises or to regulate. 3 Chester James Antineau, MUNICIPAL CORPORATION LAW, § 29.02 (1992) ("Antineau"). See also, I Ferris, Lloyd, Casey, CABLE TELEVISION LAW, § 13.14-15 (1992). Rather, the powers to franchise and to regulate are state powers which can be extended to municipalities only through an express grant or as an implied product of an express delegation of authority. Antineau at § 29.02. Such grant of authority generally is found in state statute or constitutional provisions, or in the terms of local government charters. Id. Absent such grant, a local franchising authority cannot